NO. 85-799

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DALE A. MONROE,

Petitioner

versus

U. S. DEPARTMENT OF TREASURY,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether an adverse action against a government employee is invalidated if the official who hears the oral response does not render a decision or make a recommendation to the official who does make the decision?

II

Whether an ex parte "secret" conference the night before the hearing between the agency attorney, an official, and an employee witness previously favorable to the accused employee, is an improper violation of due process protection for government employees?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

NO.

DALE A. MONROE,

Petitioner

v.

DEPARTMENT OF THE TREASURY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit rendered on August 15, 1985, appeal No. 84-1523.

OPINIONS BELOW

The Federal Circuit in a decision dated August 15, 1985, denied Petitioner's appeal (Appendix A) and affirmed the Merit Systems Protection Board's decision of May 11, 1984 (Appendix B).

GROUNDS FOR JURISDICTION

Petitioner seeks review by this Court of the Federal Circuit decision pursuant to Rule 17.1(c) of the Rules of the Supreme Court and 28 U. S. C. § 1254(1). (An appeal from a decision of the Merit Systems Protection Board to the Federal Circuit was made pursuant to 5 U. S. C. § 7703. The judicial and administrative decisions affirmed the removal from the service of former U. S. Treasury special agent Dale A. Monroe.)

PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The specific statute involved is 5 U. S. C. § 7513 which assures a government employee the right to respond orally and in writing to specific charges filed against him by his agency and a regulation which clarifies this statute: 5 C. F. R. § 752.404(c) (2).

One question in this case is also concerned with an interpretation of the due process clause of the Constitution of the United States.

5 U. S. C. § 7513 - Cause and procedure

(a) Under regulations prescribed by the Office of

> Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.
>
> (b) An employee against whom an action is proposed is entitled to—
>
> (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

5 C. F. R. § 752.404(c) (2):

> The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations in accordance with paragraph (g) of this section.

STATEMENT OF THE CASE

Special agent Dale A. Monroe, a 12 year veteran employed by the Bureau of Alcohol, Tobacco and Firearms (ATF), Department of Treasury, received a letter of proposed removal dated April 14, 1982. Subsequently, he was removed from service, and on November 9, 1982, appealed his dismissal to the MSPB regional office at Chicago.

The MSPB held a hearing and on January 17, 1984, the MSPB presiding official affirmed the agency action. Mr. Monroe

petitioned the MSPB to review the decision, and on May 11, 1984, the Board affirmed the MSPB regional decision to remove petitioner from his employment.

Petitioner sought judicial review in the Federal Circuit and on August 15, 1985, that court affirmed the Board decision that the employee was properly removed from service.

Petitioner was employed as a special agent, Bureau of ATF, at Valparaiso, Indiana, and had 12 years service. The agency served him with a "proposal" letter to remove him from service based on two principal allegations: that he falsified documents by claiming he had met an informant, Myron Johnson, when he had not, and that he claimed to be working at times when he was not.

Petitioner was told to make his oral reply to the "deciding official," Mr. Robert E. Sanders, the Deputy Director in Washington, D. C., and he did so. Mr. Sanders was later demoted to Regional Director at Chicago and he was removed as "deciding official" by the ATF. He (Mr. Sanders) prepared a synopsis of the oral reply but did not make a recommendation of any kind -- written or oral.

The "new" deputy director, Donald Zimmerman, actually made the removal decision and never talked to Mr. Sanders or received his recommendation; and he never talked to the petitioner.

The petitioner claims that the written synopsis of the oral hearing contained many errors and if he had known Mr. Sanders would not make the "decision" he could have corrected them.

Shortly after the "proposal" letter was served, several events occurred that required the agency to change its direction: Informant Johnson testified in federal court that he had worked with agent Monroe; other agents gave statements that petitioner had mentioned trying to work with the informant. The agency then changed its charges that he may have met informant Johnson ---but not as many times as he said.

Special agent Holmes gave a written statement that he had heard the petitioner mention Johnson, but at the hearing he

denied that. On the day prior to the hearing he was questioned in a hotel room by the agency attorney and deputy director Zimmerman. (Mr. Holmes was listed as petitioner's witness --- not the agency's. No notice of this interview was given to the petitioner or his attorney.)

ARGUMENT

The official who hears the oral reply of an employee must be the "deciding" official --- or he must make a recommendation to the official who does make the decision. If he is neither (that is, he hears the oral reply but does not make the decision or a recommendation to one who does), it is reversible error if the omission harmed the employee. It is only necessary that the employee point out that the procedural error denied the employee "some opportunity of avoiding dismissal, however slim."

The MSPB decision must be supported by substantial evidence. The testimony of a witness who changes his statement after being questioned in a secluded manner by a high agency official prior to the hearing, and the testimony of a witness who relates what he saw at the petitioner's home when he is unable to identify the petitioner's home, do not meet that standard.

The agency attorney and deputy director are acting improperly when they question one of the petitioner's witnesses in a secluded manner prior to the hearing; and this procedure is in violation of due process if it can be shown that the witness changed his anticipated testimony after the meeting.

The written proposal to remove petitioner was made by the Regional Director of Investigations, Mr. Aaron C. Elliott, and the petitioner's oral reply was to be made to the deciding official, the Deputy Director at Washington, Mr. Robert E. Sanders. That was properly accomplished; on June 4, 1982, Mr. Sanders heard his oral reply and a typed synopsis was prepared. (The petitioner contends that the synopsis was not entirely accurate.)

That is the last time in this case Mr. Sanders was heard from; he

did not make the decision and he did not make a recommendation to the official who did --- and he did not appear at the hearing to explain why. No explanation has ever been given to the petitioner as to why he could not make an oral reply to the official who was to make the decision or at least have a recommendation from the official who did receive the oral reply.

After he received the oral reply, Mr. Sanders was demoted and transferred to Chicago as the RDI and the decision to remove the petitioner was made by Donald Zimmerman, the newly installed Deputy Director, Criminal Enforcement at Washington.

The regulation, 5 C. F. R. § 752.404(c) (2), clearly intends that the official receiving the oral reply will be the official who makes the "decision," or if not, will make a recommendation to the person who does. (Otherwise there would be no point in exercising the oral reply procedure.) Mr. Sanders did neither; he did not make the decision and he did not make a recommendation to the official who did.

What would have been Mr. Sanders' decision or recommendation if he had made either? The only one who could possibly ever know that would be Mr. Sanders and this is why, perhaps, the agency did not have him at the hearing. It is illogical to assume that if he had made a favorable recommendation to Mr. Zimmerman that it would have been disregarded.

The meaning and purpose of the oral reply was judicially declared in *Ricucci v. United States*, 425 F.2nd 1252 at pg. 1255 (Ct. Cl. 1970):

> Taking the Regulation and Manual together, in summary, we read them as written for the protection of employees, and meaning that after adequate notice of charges and before dismissal, the accused employee may have an opportunity to discuss his case with an official of his agency. Not only may he state anything he pleased, from the number of mouths he has to feed to the alledged bias of his immediate supervisor, but he may

> expect help in presenting his case in form of such comments from the other side as would be natural from a person knowledgeable about the case and expecting largely to influence its resolution...Further, he has a right to expect that the "oral reply officer" will be one whose recommendation would be meaningful, not an empty formality. This would be normally assured if he was one of the deciding officer's circle of staff and line aides and advisers whom he regularly consults in such matters, unless the deciding officer has gone outside that circle for help for the employee's own better protection. In that case the record would show how the outsider's expertise was relied on.

The purpose of the "oral reply" as declared in *Ricucci* by the Court of Claims, was mandatorily accepted by the MSPB, but the Board limited the scope somewhat in *Swindell v. Veterans Administration*, 10 MSPB 691 (1982) by holding that the record must show some reasons tending to show that the outcome *might* have been different had the agency followed the correct procedure. The Congress mandated the right to make an oral reply to an employer as a substantial due process right for the employee --- not merely discretionary procedure that can or cannot be used by the agency. The statute provides "a reasonable time...to answer orally and in writing...." 5 U. S. C. § 7513(b) (2).

There is no way, of course, anyone could ever show with certainty that a different conclusion would have been reached by the deciding official if he had received a recommendation from the official who heard the oral reply. Recognizing this impossibility, this court, in *Cheney v. Department of Justice*, 720 F.2nd 1280, at p. 1285 (Fed. Cir. 1983) said that it was only necessary for the employee to prove the erroneous procedure denied him a "slim opportunity" to avoid dismissal.

> For the error to have been harmful, however, it must be shown that the erroneous procedure

> denied Mr. Cheney some opportunity of avoiding dismissal, however, slim, that the correct procedure, one or the other, would have permitted.

The Board's regulations provide that the burden is upon the petitioner to show harmful error, and that harmful error is that which "...*might* have caused the agency to reach a conclusion different than the one reached." (emphasis added)
5 C. F. R. 1201.56(c) (3).

The Federal Circuit denied Petitioner's argument and found that Monroe (Petitioner) "has not demonstrated the harmfulness of the error of the agency by a showing that the absence or cure of the error 'might have caused the agency to reach a conclusion different than the one reached.' " 5 C. F. R. § 1201.56(c) (3).

The crucial question, and the one the agency based most of its charges upon, was whether petitioner showed sign of, or had previously met, informant Myron Johnson at a meeting with Johnson and several other agents on December 30, 1982. After the issue came into dispute, special agent Ronald Holmes made a written statement that he (Holmes) had heard the petitioner mention Johnson's name "once or twice" while in the FBI office at Gary. (This was highly beneficial to the petitioner and would imply prior recognition of Johnson. Consequently, Holmes was listed as a witness for the petitioner--and not the agency.) (Administrative Record)

At the hearing, agent Holmes took the opposite stance on direct examination:

> *Question*: ....from the time you arrived at the FBI office, which was approximately 11:00 or 12:00 o'clock of December 30 until approximately 7:00 or 7:30, when you served the search warrant, did Special Agent Monroe tell you, or in some way indicate to you, that he knew the informant Myron Johnson?
>
> *Answer:* No, he did not.

The likely reason for this incredible switch in testimony was

brought out on cross examination by the petitioner's attorney: agent Holmes was assigned to pick up the agency attorney at the Chicago airport the day before the hearing and he carried him to a hotel where they met Mr. Zimmerman, the Deputy Assistant Director, where the three of them had a "conference" about the hearing the next day. The next day agent Holmes switched his testimony to favor the agency. Out of approximately 50 agents in Chicago, agent Holmes was selected to meet the agency lawyer at the airport.

The Petitioner strongly objected to this procedure before the MSPB but the Board did not mention the issue in its decision. (App. B)

The Federal Circuit said that the petitioner did not argue that some specific statute or regulation prohibited ex parte contacts between management and an employee's witness (who is also a government employee) the night before the hearing; therefore, the Federal Circuit did not find error in these contacts. (App. A)

CONCLUSION

The Federal Circuit has ruled a "deciding official" who hears an oral response from an employee concerning allegations against the employee, is not required to make a decision in the case---or make a recommendation to one who does make a decision.

It has also found that "secret" meetings between a management official, the agency lawyer and an employee witness previously favorable to the accused employee, the night before the MSPB hearing, are not improper and do not adversely affect due process protections for the accused employee.

The Supreme Court is urged to review this case and announce some due process procedural protection for government employees who chose to exercise a right mandated for them by the Congress; and some requirement that would strengthen the integrity of an administrative (MSPB) hearing.

Respectfully submitted,

WILLIAM M. PACE
Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance with the rules, I certify that I have this date served three copies of the above petition for writ of certiorari upon the Solicitor General of the United States, U. S. Department of Justice, Washington, D. C. 20520, and three copies upon the General Counsel, Department of Treasury, 15th Street and Pennsylvania Ave., N. W., Washington, D. C. 20220, by first class mail.

This the 6th day of November, 1985.

WILLIAM M. PACE

United States Court of Appeals for the Federal Circuit

DALE A. MONROE,
Petitioner,
v.
DEPARTMENT OF THE TREASURY,
Respondent.

Appeal No. 84-1523

DECIDED: August 15, 1985

Before BENNETT, SMITH, and BISSELL, *Circuit Judges.*

BENNETT, *Circuit Judge.*

This is an appeal from the order of the Merit Systems Protection Board (board), 20 M. S. P. R. 620 (1984), rendering final the initial decision of the presiding official issued December 13, 1983. We affirm.

BACKGROUND

Petitioner Monroe had served in the Bureau of Alcohol, Tobacco and Firearms (the agency) for 12 years and was employed there as a special agent when his removal was proposed for falsification of government documents concerning the hours of his work and his contacts with a potential agency informant. The specific falsifications referred to in support of the charge included (a) misleading entries in a report of investigation submitted by

Monroe to obtain approval for the use of the potential informant (Specification I), (b) six false or misleading diary entries concerning his meetings with the informant and his hours of work in other respects (Specification II), and (c) false entries on three administrative uncontrollable overtime reports (Specification III).

Monroe made an oral response to the charges before agency Deputy Director Sanders, the official initially designated to decide the case. Sanders, however, was transferred to another position and removed as deciding official. Without giving a recommendation or deciding on Monroe's proposed removal, Sanders prepared a written summary of the oral response hearing. This, together with a written statement by Monroe and other documents, was reviewed by the new deciding official, agency Deputy Director Zimmerman, who sustained all of the specifications and the proposed removal.

On appeal to the board, Monroe was afforded a full hearing where he was required by the presided official to detail all of his objections to the written summary of his oral response that had been prepared by Sanders. Thereafter, the presiding official submitted a thorough opinion reviewing the evidence and making explicit credibility determinations. Specification I was found not to have been supported by a preponderance of evidence, but all of the other specifications were sustained.

DISCUSSION

A. *Oral Response Hearing*

Monroe claims that his oral response to Sanders was given with the expectation that the latter would at least make a decision or a recommendation about the proposed removal. As this did not occur, and as Monroe was not notified that it would not, it is asserted that he was denied his right to a properly conducted oral response hearing. Monroe claims that he would have been more aggressive at the agency level in pointing out errors in the

summary by Sanders had he been advised of Sanders' true role in the process.

The conduct of the oral reply hearing is governed by 5 C. F. R. § 752.404(c) (2) (1983), which states:

> The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations in accordance with paragraph (g) of this section.

Monroe argues that this means the official who hears the oral answer of an employee must either make or recommend a final decision on the proposed adverse action. We disagree.

"The law is silent on whom the agency may designate to hear an employee's oral answer. The Office's regulations require that the person designated be one who has delegated authority in the agency to make or recommend a decision." *Federal Personnel Manual*, ch. 752, subch. 3-3g(5) (December 31, 1980). No decision of this court has suggested what form the personal interview at the agency level ought to take. In the published order in *Miller* v. *United States*, 227 Ct. Cl. 618, 619-20 (1981), in response to an argument similar to that made here by Monroe, it was stated that:

> Plaintiff mistakenly assumes that the person charged with making the final decision is the *only* appropriate party to conduct an oral reply. We find no authority to support...[this] position. What is required is that the person who hears the answer "shall be [selected from] persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made." (Emphasis in original.)

It has not been asserted that at the time of the oral response hearing Sanders lacked the authority to "make or recommend a

final decision."

When Sanders was reassigned within the agency, it was appropriate that he prepare a summary of the oral response by Monroe. That summary was made available to Monroe, who submitted his own response detailing points of disagreement. Both were reviewed by Zimmerman before making his decision on the proposed removal. Thus, all of the information and arguments that Monroe made in the course of his oral reply were before the deciding official.

Ironically, the effectiveness of the oral response hearing may have been undercut through a procedural strategy adopted by Monroe. Despite the desire of Sanders to go over each specification with Monroe, the latter, who was in the process of revising his written response to the proposed removal but did not have a copy with him at the hearing, declined to cooperate, in order to avoid being caught, as he put it, "in a contradiction."

Assuming arguendo that in the conduct of the oral response hearing procedural error could be shown, Monroe still would not prevail because he has not demonstrated that the failure of Sanders to make a recommendation denied him the opportunity of "avoiding dismissal, however slim." *Cheney* v. *Department of Justice*, 720 F.2d 1280, 1285 (Fed Cir. 1983). Monroe expressed to Sanders his own preference to rely on his written response as to many matters. This response and his critique of the summary of the oral reply prepared by Sanders were before the deciding official. We are at a loss, therefore, to understand what in Monroe's case Sanders could have considered that was not also before Zimmerman.

In short, Monroe has not demonstrated the harmfulness of the purported error of the agency by a showing that the absence or cure of the error "might have caused the agency to reach a conclusion different than the one reached." 5 C. F. R. § 1201.56(c)(3). This burden falls on Monroe. *Id.*; 5 U. S. C. § 7701(c)(2)(A). *See generally Shaw* v. *United States Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983). "The court is not required to conjure up reasons why a procedure is harmful [merely] because of a bald

allegation of harmfulness alleging different reasons or none..." *Cheney*, 720 F.2d at 1285.

The circumstances of this case present nothing approaching the egregiousness of agency procedures condemned in *Ricucci* v. *United States*, 425 F.2d 1252, 1256 (Ct. Cl. 1970) (oral hearing before investigator chosen from outside employee's agency division for the apparent purpose of preventing employee "from learning anything he could use in his case") or in *Patterson* v. *United States*, 319 F.2d 882, 884-85 (Ct. Cl. 1963) personal hearing before inspector who developed the facts to substantiate proposed discharge). In *Cheney*, 720 F.2d at 1285, even the removal of a designated hearing officer after his inclination to mitigate the proposed penalty, while not favored by the court, was found not to have been harmful. Monroe has not shown that the conduct of his oral response hearing could have had an adverse impact upon him. *See also Swindell* v. *Veterans Administration*, 10 MSPB 691 (1982).

B. *Ex Parte Contacts*

Monroe complains that a witness whose name appeared on his own witness list was interviewed without notice to Monroe by the agency attorney and by Deputy Director Zimmerman the day prior to the hearing before the board. Allegedly, at the hearing the testimony of the witness was adverse to Monroe, in contrast to his previous favorable statements.

Stressing that Zimmerman would have been a superior officer of the witness, Monroe argues on the basis of *Sullivan* v. *Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983), that this allegedly improper agency contact should void the decision against him. *Sullivan*, however, is not applicable. The ex parte contacts there were not between a witness and the opposing attorney or one of the agency superiors of the witness. Rather, of significantly more impact on the rights of the employee to an impartial evaluation of the proposal for his removal, in *Sullivan* "a true adversary [to the employee] with motives of reprisal sought to pressure the deciding official into making a decision to remove the

petitioner." *Id.* at 1272.

Further, it has not been argued that any statute or regulation prohibits the type of ex parte contacts of which Monroe complains. In the absence of such, we cannot find error in the contacts that resulted. *See DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985) (individual proposing removal and agency official deciding case may even be identical, absent contrary "statute, regulation, policy, directive, Board decision, or court decision"); *Welcker v. United States*, 752 F.2d 1577, 1582-83 (Fed. Cir. 1985); *Depte* v. *United States*, 715 F.2d 1481, 1484 (Fed. Cir. 1983). Thus, we hold that no procedural error occurred in this regard.

Even were error to have been made out, it has not been shown to have been harmful, as required to effect reversal of the board decision. At the hearing, the witness was subject to cross-examination which disclosed to the presiding official the meeting of the day before. This alone would seem to afford adequate due process protection. *See id.* In addition, the presiding official determined not to affirm the charge contained in Specification I, and it was toward that charge that the testimony of the witness involved was substantially pertinent. Thus, Monroe has suffered no harmful, reversible error through the ex parte contacts here at issue. *See Shaw*, 697 F.2d at 1080.

C. *Substantial Evidence*

Monroe asserts that the agency decision was not supported by substantial evidence, pointing out weaknesses in the evidentiary support for some of the charges against him. Nevertheless, a case without weaknesses is not what is required to sustain agency action upon review at this level. As stated in *Hayes* v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984):

> We discharge our own duty when we apply section 7703 to review an MSPB decision regarding an adverse agency action to determine whether the contested decision complies with the applicable

> statute and regulations and whether it has a rational basis supported by substantial evidence from the record taken as a whole. The record need only disclose such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached.

We find that the record here discloses that degree of relevant evidence as would support the conclusion of the board.

The appropriateness of the penalty has not been contested.

AFFIRMED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DALE A. MONROE

v.

DEPARTMENT OF THE TREASURY

DOCKET NUMBER
CH07528310112

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on December 13, 1983, and finding that it does not meet the criteria for review set forth at 5 C. F. R. § 1201.115, the Board hereby DENIES the petition.

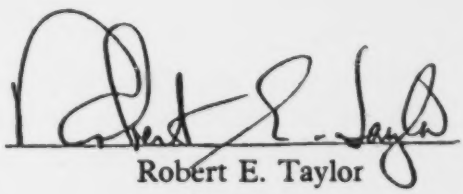
We find that appellant has failed to show harmful error in the agency's decision to change the deciding official after appellant made his oral reply to the charges. The summary of the oral reply, as well as appellant's written reply, were both considered by the new deciding official, and even in the absence of a specific recommendation by the reply official, appellant has presented nothing to suggest that if he had made a recommendation it would have been favorable and that upon receipt of such a recommendation it is likely that the deciding official would not have removed appellant. *See* 5 C. F. R. § 1201.56(c) (3); *Baracco* v. *Department of Transportation*, MSPB Docket No. DC075281F0895 (April 25, 1983); *Swindell* v. *Veterans Administration*, 10 MSPB 691 (1982). Moreover, appellant's assertions that the initial decision is contrary to the weight of the evidence are insufficient to show error. They identify no evidence which the presiding official failed to consider or other reason for the Board to re-evaluate the evidence and make new findings of fact. The presiding official's findings are properly given deference by the Board. *Weaver* v.

Department of the Navy, 2 MSPB 297 (1980).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C. F. R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U. S. C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:



MAY 1 1 1984

(Date)
Washington, D. C.

Robert E. Taylor
Secretary

upreme Court, U.S.
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DALE A. MONROE, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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UNITED STATES DEPARTMENT OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges his removal from the Bureau of Alcohol, Tobacco and Firearms for falsifying records concerning his contacts with a potential informant and the number of hours he worked.

1. a. In 1982, the Bureau of Alcohol, Tobacco and Firearms removed petitioner from his position as a criminal investigator, on the grounds that he had made false or misleading entries on official documents concerning his contact with a potential informant and the hours he worked. Prior to his removal, petitioner was afforded the opportunity to make an oral and a written reply to the charges against him, and he made both. At the time of petitioner's oral reply, the official who heard it possessed authority to make a decision or recommendation regarding the proposed removal. Before doing so, however, the official was transferred to another position. The original

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official provided the new official who was to decide the matter with a detailed synopsis recounting petitioner's oral reply. After reviewing the synopsis and petitioner's response setting forth his disagreements with it, the new official decided to remove petitioner. Pet. App. A1-A4.

Petitioner appealed his removal to the Merit Systems Protection Board (MSPB or Board). On the day before the presiding official's hearing of the matter, the attorney responsible for presenting the agency's case and the new official interviewed one of the agency employees (who was several levels removed from the latter) designated by petitioner as a witness (Pet. App. A5).

b. The presiding official of the MSPB issued a detailed decision, finding that the relevant charges against petitioner were supported by the evidence,[1] that the agency did not commit harmful procedural error in effecting petitioner's removal, and that the penalty of removal was appropriate. The Board denied petitioner's petition for review, finding that petitioner had "failed to show harmful error" regarding the agency's transfer of the original official, because the summary of the oral reply and petitioner's written reply were considered by the new official and petitioner "ha[d] presented nothing to suggest" that a recommendation by the original official would have been favorable or that it would have affected the deciding official's action (Pet. App. B1).

c. The court of appeals affirmed (Pet. App. A1-A7), finding no harmful error in the removal process. It noted first that the relevant regulation, 5 C.F.R. 752.404(c)(2), requires only that the official hearing the oral reply have the

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[1]The presiding official found that one of the agency's ten specifications supporting removal was insufficiently supported by the evidence; that specification—charging petitioner with making false or misleading entries on one report—is not relevant to the instant petition.

authority to make or recommend a final decision, not that he actually do so. It further noted that all information and arguments proffered by petitioner in the course of his oral reply were before the deciding official prior to his decision; thus, assuming arguendo that there was a procedural error, petitioner had still failed to demonstrate that it could have had any effect on the agency's decision to dismiss him (Pet. App. A2-A5). The court also held that the interview of a witness by the agency attorney and new official did not constitute a forbidden ex parte contact, since it did not involve contact with a deciding official prior to his decision and was not prohibited by statute or regulation, and that it was not shown to have been prejudicial (*id.* at A5-A6). Finally, the court found that the Board decision was supported by substantial evidence (*id.* at A6-A7).

2. The sequence of events in this case is obviously unusual, and even if there were procedural error in either of the respects petitioner claims, he has failed to demonstrate any harm arising from it. Petitioner does not assert a conflict between the factbound decision of the court of appeals in this case and any decision of this Court or any other court of appeals; indeed, he cites no cases from any other court. In any event, there was no error.

a. Petitioner's argument that it was improper for the agency to remove petitioner from his position in the absence of a recommendation from the official who heard his oral reply is defective in two respects. First, it fails to identify any regulatory or statutory protection of which petitioner was deprived. The pertinent regulation provides that the oral reply must be heard by an official having authority to make or recommend a final decision on the proposed adverse action. 5 C.F.R. 752.404(c)(2). As the court of appeals correctly noted, it is not disputed that the official who heard the oral reply possessed such authority at the time he heard

it (Pet. App. A3-A4). Thus, petitioner received the procedural protections to which he was entitled. See *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 12 (1979); see also *Swindell* v. *Veterans Administration*, 12 M.S.P.R. 148, 150 (1982) (presiding official "found that the oral reply official has the option of declining to make a recommendation" at all).[2]

Second, petitioner is unable to advance a credible statement of how this alleged error was harmful. The court of appeals pointed out that "all of the information and arguments that [petitioner] made in the course of his oral reply were before the deciding official" (Pet. App. A4); at his hearing, petitioner "was required by the presided [*sic*] official to detail all of his objections to the written summary of his oral response that had been prepared by [the original

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[2]Petitioner seems to contend that, even if the letter of 5 C.F.R. 752.404(c)(2) was satisfied, its spirit was not, since no recommendation was made. He is incorrect, however, in saying that without a recommendation "there would be no point in exercising the oral reply procedure" (Pet. 6). As the Court of Claims explained in *Ricucci* v. *United States*, 425 F.2d 1252 (1970), the purpose of an oral reply is to provide a colloquy between the employee and someone who has the expertise to make the colloquy meaningful and the status to encourage it. This ensures that the colloquy will reveal to the employee "how his presentation is going, what is making an impression and what is not, what needs clarification or substantiation, and what had best simply be dropped." *Id.* at 1254. It is undisputed here that such a colloquy took place. While the purpose of it may have been thwarted somewhat by petitioner—who relied most heavily on his written response—when he refused to answer specific questions because he did not want to be "caught, as he put it, 'in a contradiction,' " that is attributable to petitioner, not to the procedure utilized by the agency (Pet. App. A4). The oral reply officer had the expertise and the status to satisfy the spirit as well as the letter of 5 C.F.R. 752.404(c)(2). The only other possible reason to require an actual recommendation would be if there was some danger of losing demeanor evidence, but petitioner has not made that claim in this case.

official]" (*id.* at A2).[3] The court of appeals concluded that it could not "understand what in [petitioner's] case [the original official] could have considered that was not also before [the new official]" (*id.* at A4).[4]

b. Petitioner's argument that the agency's interview of an employee designated as a witness for petitioner constituted improper ex parte contact is similarly unavailing. As the court of appeals correctly pointed out (Pet. App. A6), there is no statutory or regulatory authority to support petitioner's novel assertion that counsel may not interview non-party witnesses privately. This is not surprising. The American Bar Association Committee on Professional Ethics and Grievances stated over 50 years ago that an attorney "must ascertain the truth and bring it out in the trial and to that end may properly interview witnesses subpoenaed by the other side, if no deception is practised by him, in order that justice may be done." Formal Op. 127 (1935); see also Formal Op. 117 (1934); Formal Op. 14 (1929); Informal Op. 892 (1965); cf. Model Rules of Professional Conduct 3.4(a) and (b) (1983).

An interview with a witness simply cannot be successfully analogized to ex parte contact with a decisionmaker. Ex parte communications with a decisionmaker acting in a quasi-judicial capacity are improper because they can provide the decisionmaker with information or arguments to which the other party may not have an opportunity to

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[3]Indeed, petitioner apparently acknowledged that at his MSPB hearing he corrected all the alleged inaccuracies in the synopsis of his oral response (Tr. 576). In any event, the presiding official concluded that these alleged inaccuracies were "minor" and rejected petitioner's assertion of harmful error (Presiding Official's Decision 11-12 (No. CH07528310112 (Dec. 13, 1983)).

[4]The court of appeals applied the harmless error standard petitioner himself urges (compare Pet. 7-8 with Pet. App. A4), so petitioner's challenge to the court's decision is necessarily fact-specific.

respond. Contact with a witness is far different. His participation is limited to recounting his knowledge of the relevant facts. It is essential for an attorney to know the information possessed by the witness in order to represent his or her client properly. As noted above, such information gathering is encouraged, rather than prohibited. Finally, opposing counsel can (and, in this case, did) cross-examine or otherwise respond to the witness (see Pet. App. A6). We note that if one were to adopt petitioner's approach, a party could halt the fact-finding process simply by listing all knowledgeable individuals as witnesses.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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[5]As the court of appeals pointed out (Pet. App. A6), even if the pre-hearing contact was improper, it was harmless error. We note in this regard that, contrary to petitioner's assertions (Pet. 8), there was no inconsistency between the witness's earlier written statement and the testimony he gave at the hearing. Tr. 269-270.

NO. 85-799

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DALE A. MONROE,

Petitioner

versus

U. S. DEPARTMENT OF TREASURY,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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The respondent argues that the agency (Bureau of ATF, Department of Treasury) procedure in this case, which allowed the agency official who heard the employee's oral response to neither make a decision nor make a recommendation to the official who did make the decision, was proper for two reasons:

First, respondent now contends that the statute and regulation [5 U. S. C. 7513, 5 C. F. R. 752.404 (c) (2)] which

acknowledge and provide government employees the due process protection of replying orally to a deciding official, or one who can make a recommendation --- are fully satisfied if the official does neither. Thus, according to the respondent, procedural requirements detailed by the Congress and prescribed by the Office of Personnel Management (OPM) need not be followed unless the written rule is followed by this sentence: "This procedure must be followed in letter and in spirit."

The need for procedural due process protection for citizens has long been recognized and described by Congress, boards and courts. In 1977-78 the Congress was aware that federal employees must be given procedural, as well as sustantive, due process protection, and it expanded the Civil Service Reform Act by creating an Office of Special Counsel, within the MSPB, to represent employees against prohibited personnel practices. And the Congress also retained the right for an employee to give an oral, face-to-face presentation to someone in authority in the agency.

The compelling need for these protections was apparent in 1977 and has been amply demonstrated since then; U. S. Air Force and Defense Department employees have been demoted, transferred or fired by merely pointing out that it is improper to pay $632 for a plastic toilet seat and a host of other examples similar to that one. The Congress and the OPM felt that all employees should have the right to demonstrate their credibility by orally responding to a responsible official in the agency --- one who would have some influence over the final disciplinary decision --- either make the decision or recommend one. The petitioner special agent had 22 years of honorable experience in law enforcement (twelve with this agency) and he would qualify under any guideline for consideration.

The official appointed to hear the oral reply in this case was not the "wrong person" from the standpoint of qualifications;

he was qualified but he simply did not follow through on his responsibility for personal or other reasons.

The second reason urged by the respondent is that the petitioner did not give a "credible statement" of how the procedural error harmed him. The petitioner used several pages of testimony transcript to do this, but one cannot know what the agency considers "credible" or not. The agency official who heard the oral reply may have recommended favorable treatment for the petitioner because he told him that he was more concerned with whether the agent had previously met the informant (Administrative Record Tab 5). Abundant evidence existed, and more was developed later, that the special agent had previously worked with the informant; however, the actual "decision agency official" ignored this evidence and the charge remained until it was removed by the MSPB Presiding Official. The official who heard the oral reply did not perform his function as described by the Court of Claims: "... further, he has a right to expect that the 'oral reply officer' will be the one whose recommendation would be meaningful, not an empty formality." *Ricucci v. United States*, 425 F. 2nd 1252 at pg. 1255 (1970).

The Solicitor General now maintains that the "oral reply officer" is not required to do anything --- and that could be one's impression of the Federal Circuit decision in this case; however, the court also maintains that procedural rules need not be followed unless the person affected can show that the rules would have been beneficial. Those are the questions concerning procedure that are now before the Supreme Court.

With regard to petitioner's argument of improper ex parte private meeting of petitioner's witness, agency official, and attorney the night before the hearing, respondent argues that this is necessary as part of the fact-finding process --- apparently forgetting that the "fact-finding" or investigation phase of the case ended a few weeks prior to that.

The matter was now in the "court" or hearing phase and

the meeting changed a witness who had conscientiously supported the petitioner because he worked with him into one who did not. The Deputy Director had full authority to transfer, demote, promote, or assign the witness and he knew that. The employee's change the next day startled the petitioner and his attorney and the reason for the change was accidentally discovered upon cross examination.

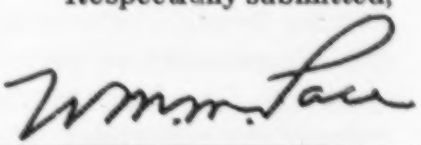
Petitioner's implication that the "cross examination" procedure would clear up any harm done does not consider human nature or how the Federal investigative agencies are sometimes operated. An employee's fear of reprisal from management is often stronger than his inherent desire for truth, especially on such short notice. If he admitted that in an open hearing he would likely get the reprisal.

Petitioner knows of no statutory or regulatory rule that addresses this procedure because secret meetings under these circumstances is obviously unfair and discourteous; therefore, it need not be prohibited explicitly by statute.

The administrative and judicial decisions below (Agency, MSPB and Federal Circuit) in this case amount to broad declarations that procedural safeguards do not have to be followed except in cases where the employee meets the burden of proof to prove that the procedures may have been beneficial to him; and that government managers may require adverse employee witnesses to submit to private questioning during the MSPB hearing.

These questions are important and deserve review by the Supreme Court.

Respectfully submitted,

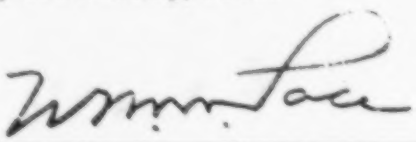


WILLIAM M. PACE
Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance with the rules, I certify that I have this date served three copies of the above Reply Brief for Petitioner upon the Solicitor General of the United States, U. S. Department of Justice, Washington, D. C. 20520, and three copies upon the General Counsel, Department of Treasury, 15th Street and Pennsylvania Ave., N. W., Washington, D. C. 20220, by first class mail.

This the 27th day of February, 1986.



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